Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ELLIOT GIRAUD-PINEIRO,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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73 pp

QUESTIONS PRESENTED

WHAT IS THE STANDARD OF REVIEW FOR A CLAIM THAT THE GOVERNMENT BREACHED A PLEA AGREEMENT WHEN THE DEFENDANT DID NOT OBJECT AT SENTENCING?

DOES THE GOVERNMENT VIOLATE A DEFENDANT'S CONSTITUTIONAL RIGHTS BY MAKING ALLEGATIONS AT SENTENCING CONTRARY TO THE FACTS STIPULATED IN THE PLEA AGREEMENT?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, ELLIOT GIRAUD-PINEIRO, by his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, affirming the judgment and sentence, with rehearing and suggestion of rehearing en banc denied on November 21, 2001.

OPINION OF THE COURT BELOW

The written opinion of the Court of Appeals for the First Circuit is included in the appendix. *United States v. Giraud-Pineiro*, 269 F.3d 23, No. 01-1298 (1st Cir. Oct. 19, 2001). [App. 1].

JURISDICTION

The judgment of the Court of Appeals was entered on October 19, 2001. The timely petition for rehearing and suggestion for rehearing en banc was denied on November 21, 2001. This petition is filed pursuant to Rule 13, Rules of the Supreme Court. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254(1).

APPLICABLE PROVISIONS

". . . [N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived

of life, liberty, or property, without due process of law . . . " U.S.Const. Amend. V.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ; [and] to be confronted with the witnesses against him. . . . " U.S.Const. Amend. VI.

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to resolve an acknowledged conflict between the circuits about the proper standard of review when the defendant claims the government breached the plea agreement and the proper application of this Court's decision in *Santobello v. New York*, 404 U.S. 257 (1971). The First Circuit and four other circuits have held that a defendant's claim of a breach of the plea agreement by the government must be reviewed for plain error where it was not raised at the time of sentencing. However, three circuits have held that a *de novo* standard applies regardless of whether the defendant objected to the alleged breach at sentencing. Further, the First Circuit in the case at bar held that a plea agreement is not violated even though the prosecutor presents facts contrary to those stipulated in the plea agreement. The First Circuit's decision conflicts with the law in four other federal circuits.

Elliot Giraud-Pineiro pled guilty to conspiracy to possess cocaine with intent to distribute and conspiracy to finance illegal narcotics transactions. [App. 19]. According to the stipulated statement of facts attached to

the plea agreement, the overall conspiracy involved hundreds of kilograms of cocaine. [App. 28]. However, the government specifically stipulated in paragraph (8)(a) of the plea agreement that Mr. Giraud-Pineiro would be held accountable for only 3.5 to 5 kilograms of cocaine. [App. 22]. This provision made him eligible for a guideline sentence of 97-121 months. In paragraph (8)(k) of that plea agreement, the government recognized that Mr. Giraud-Pineiro would argue for a sentence "at the lower end of the applicable guideline range," (*i.e.*, 97 months), but warned that the government would be recommending a high-end sentence of 120 months. [App. 23].

At sentencing, the defendant requested a guideline sentence of 97 months. [App. 41]. Despite the agreement that Mr. Giraud-Pineiro would be held liable for less than 5 kilograms of cocaine, the prosecutor insisted that Mr. Giraud-Pineiro actually pled guilty to conspiracy to possess more than 5 kilograms of cocaine, as originally stated in the indictment. [App. 42].[1] Allocuting for a high-end sentence, the prosecutor argued that the amount stipulated in the agreement was just "the recommendation of the parties." [App. 42-43].

> The indictment in this case reads that it was a conspiracy to possess over 5 kilograms of cocaine. The plea agreement states that that's what he pled to. He didn't plead to 3.5, he actually pled to possessing over 5 kilograms of cocaine. . . . And yes, the plea agreement says an

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[1] The transcript of the sentencing hearing incorrectly attributes these statements to defense counsel, Mr. Velez. *See* [App. 41]. In context, it is clear they are the statements of the prosecutor, Ms. Torres.

> amount stipulated to, but that's not even binding on the Court. That was just the recommendation of the parties.

[App. 42].

Apparently believing this "recommendation" did not bind the government, the prosecutor in her allocution argued that Mr. Giraud-Pineiro should be sentenced to 120 months because he was in fact responsible for hundreds – if not thousands – of kilograms of cocaine:

> From the inception of this case, during the detention hearing, the United States summarized the evidence in its possession against the defendant and made it very clear that this was a drug-smuggling organization and this defendant was responsible for importing not hundreds, but **thousands** of kilograms into the district of Puerto Rico.

[App. 42].

> And we will prove beyond a reasonable doubt that this defendant imported **thousands** of kilograms into the district of Puerto Rico, and therefore, if he had proceeded to trial, he would be starting at a level 38.

[App. 43]. Later, the prosecutor argued that Mr. Giraud-Pineiro was involved in importing hundreds of kilograms of cocaine into Puerto Rico: "[J]ust because of greed, [the defendant] got involved in not one but, – not two, but hundreds of kilograms into the district of Puerto Rico." [App. 46]. The government's allocution was directly contrary to the plea agreement, which stipulated that Mr. Giraud-Pineiro was responsible for not more than 5 kilograms of cocaine.

The district court adopted the government's recommendation and sentenced Mr. Giraud-Pineiro to 120 months' imprisonment. [App. 49]. Mr. Giraud-Pineiro timely appealed to the First Circuit Court of Appeals.

Without oral argument, a panel of the First Circuit affirmed the district court in a published opinion. [App. 1]. The First Circuit stated that it was applying the plain error standard because the defendant did not object to the breach in the district court. [App. 5]. Then, as if to suggest that the defendant got what he bargained for, the panel opinion emphasized the language of the plea agreement warning that the government would recommend a sentence of 120 months. [App. 5]. The court ruled that there was "**no** breach," because "[t]he government **fulfilled its obligation** under the plea agreement when it recommended a sentence of 120 months," which the plea agreement indicated the government would do. [App. 5]. In fact, the benefit of the defendant's bargain was the stipulation regarding quantity that made him eligible for a 97-month sentence – a sentence rejected by the district court after the prosecutor emphasized the quantities higher than stipulated in the agreement.

Mr. Giraud-Pineiro filed a timely petition for rehearing and suggestion for rehearing en banc, noting an intra-circuit conflict, *see United States v. Garcia*, 698 F.2d 31 (1st Cir. 1983); *United States v. Correale*, 479 F.2d 944 (1st Cir. 1973), as well as inter-circuit conflict, and conflict with this Court's opinion in *Santobello*. The First Circuit denied the rehearing petition. [App. 53-54].

REASONS FOR GRANTING THE PETITION

THE FIRST CIRCUIT'S OPINION CONFLICTS WITH OPINIONS OF THIS COURT AND OTHER CIRCUITS AS TO THE PROSECUTOR'S OBLIGATION UNDER A PLEA AGREEMENT AND THE PROPER STANDARD OF REVIEW.

Breaches of plea agreements by the government not only violate the defendant's constitutional rights but call into question the " 'honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government.' " *United States v. Lezine*, 166 F.3d 896, 901 (7th Cir. 1999) (quoting *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986)). When the government breaches the promises made in an executed plea agreement, "the defendant pleads guilty on a false promise," and the plea can no longer be considered knowing and voluntary. *See Mabry v. Johnson*, 467 U.S. 504, 509 (1984). Therefore, this Court has ruled that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). This petition seeks resolution of inter-circuit conflict on two issues involving application of this Court's decision in *Santobello*.

A. THERE IS AN ACKNOWLEDGED CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE PLAIN ERROR STANDARD APPLIES TO CLAIMS OF GOVERNMENT BREACH OF A PLEA AGREEMENT.

The First Circuit in this case ruled that the plain error standard applies when the defendant fails to bring an alleged breach of the plea agreement by the government "to the attention of the district court." [App. 5]. The Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have similarly ruled. *See United States v. McQueen*, 108 F.3d 64, 65 (4th Cir. 1997); *United States v. Goldfaden*, 959 F.2d 1324, 1327-28 (5th Cir. 1992); *United States v. Barnes*, 2002 WL 113825 (6th Cir. Jan. 30, 2002); *United States v. D'Iguillont*, 979 F.2d 612, 614 (7th Cir. 1992); *United States v. Benson*, 836 F.2d 1133, 1135-36 (8th Cir. 1988); *United States v. Flores-Payon*, 942 F.2d 556, 558-59 (9th Cir. 1991); *United States v. Jefferies*, 908 F.2d 1520, 1524 (11th Cir. 1990).

However, three other circuits – the Second, Third, and Tenth Circuits – have applied a *de novo* standard to a defendant's claim that the government breached the plea agreement, regardless of whether the defendant objected to the alleged breach in the district court. *See United States v. Lawlor*, 168 F.3d 633, 636 (2d Cir. 1999); *United States v. Moscahlaidis*, 868 F.2d 1357, 1360 (3d Cir. 1989); *United States v. Courtois*, 131 F.3d 937, 938 & n.2 (10th Cir. 1997). These courts have held that a defendant's failure to object to violations of the plea agreement at sentencing neither waives the defendant's right to appeal nor requires the court to conduct a plain error review.

The Sixth and Ninth Circuits have recognized the conflict among the circuits on this issue. *Barnes*, 2002 WL 113825 at *3-4 ("our review is guided by a plain error standard . . . [although several circuits] hold that a *de novo* standard is used"); *Flores-Payon*, 942 F.2d at 559 ("The Eleventh Circuit shares our view. . . . However, the Third and Tenth Circuits take a different view"). Resolution of this conflict is essential to bring uniformity to the circuits in reviewing these claims which go to the heart of the fairness of our judicial system.

B. THE CIRCUITS DISAGREE AS TO WHAT CONDUCT BY THE GOVERNMENT CONSTITUTES A BREACH OF THE PLEA AGREEMENT.

The First Circuit in this case ruled that a plea agreement was not violated even though the prosecutor presented facts at sentencing contrary to those stipulated in the plea agreement. Four other circuits, applying *Santobello*, have held that the government is strictly bound by the plea agreement and violates the defendant's constitutional rights when the prosecutor makes statements at sentencing that are contrary to the plea agreement. Resolution of this conflict is necessary to provide clear, concise guidelines for courts and prosecutors about the government's obligations under plea agreements

In *United States v. Boatner*, 966 F.2d 1575 (11th Cir. 1992), the plea agreement stipulated "that two ounces of cocaine would be the only quantity considered for sentencing purposes." *Id.* at 1577. At sentencing, the prosecutor defended the presentence report's listing of a higher

amount. *Id.* at 1577-78. Even though the prosecutor stated at sentencing that "the government will stick to its stipulation," the Eleventh Circuit found a breach of the plea agreement: "Consequently, the government violated its agreement at the sentencing hearing when it attempted to bolster the presentence investigation report." *Id.* at 1579. The Eleventh Circuit remanded for resentencing before a different judge. *Id.* at 1580.

By contrast, in this case, the First Circuit ruled that the fact that the government stuck to its stipulation about the recommended sentence was enough. [App. 5]. The court appeared to find it irrelevant that the prosecutor presented information to the sentencing judge that was directly contrary to the facts stipulated in the agreement. The Eleventh and First Circuits' approaches to the prosecutor's duty under a plea agreement cannot be reconciled.

Similarly, in *United States v. Hawley*, 93 F.3d 682 (10th Cir. 1996), the Tenth Circuit also ruled that sticking with the ultimate sentencing recommendation contemplated by the plea agreement is insufficient if the prosecutor's conduct otherwise violated the terms of the agreement. In *Hawley*, the government stipulated in the plea agreement that it would not oppose the defendant's receiving a three-level reduction for acceptance of responsibility. The presentence report recommended that the defendant be denied a reduction for acceptance of responsibility. In both its written response to the presentence report and at the sentencing hearing, the prosecutor recognized the government's obligation under the plea agreement. However, the prosecutor also stated that the facts stated in the presentence report appeared to be accurate and that those

facts indicated that the defendant did not qualify for a reduction. *Id.* at 691-94.

Even though the government continued to make the recommendation required by the plea agreement, the Tenth Circuit reversed and remanded because the government breached its obligation. *Id.* at 692-94. The court noted that the government cannot do indirectly what it is prohibited from doing directly. The prosecutor's comments had the "effect" of opposing the sentencing reduction – which the government had promised not to do. *Id.* at 693.

The court rejected the government's argument that it was merely providing the court with information so that the court would not have " 'incomplete or inaccurate information.' " The prosecutor was not correcting inaccurate information. The prosecutor "merely underscored the facts recited in the PSIR" in "a thinly disguised, if disguised at all, effort to persuade the court in a way that the government had promised it would not do." *Id.*

More recently, in *United States v. Mondragon*, 228 F.3d 978 (9th Cir. 2000), the Ninth Circuit utilized a similar approach. In *Mondragon*, the prosecutor called the sentencing court's attention to the allegedly serious nature of the defendant's prior criminal offenses, despite a promise in the plea agreement that the government would "make no recommendation regarding sentence." All the information provided by the prosecutor was included in the presentence report. *Id.* at 980. The Ninth Circuit noted that "because the prosecutor's comments did not provide the district judge with any new information or correct any factual inaccuracies, the comments could have been

made for only one purpose: to influence the district court to impose a harsher sentence than that suggested by appellant's counsel." *Id.* Even though the government did not technically recommend a particular sentence, the court remanded for resentencing before a different judge, because the promise made in the plea agreement "means more than just not recommending a specific sentence." *Id.* at 980-81; *accord United States v. Mitchell*, 136 F.3d 1192, 1194 (8th Cir. 1998) (remanded for resentencing because the government "violated the spirit of . . . the plea agreement," even though it "technically adhered" to its promise).

Here, as in *Hawley* and *Mondragon*, the prosecutor was not providing new information to complete the record. She was emphasizing the government's version of the facts, contrary to the facts stipulated in the plea agreement, in order to influence the court. Moreover, in this case, there was not even technical compliance; the prosecutor presented facts to the judge that were directly contrary to facts stipulated in the agreement. In sum, the prosecutor adhered to some provisions of the agreement while violating others, yet the First Circuit found there was "no breach."[2] The approach taken by the First Circuit

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[2] If there was a breach of the plea agreement, it would be plain error: It is a "clear or obvious" error that affected the defendant's "substantial rights," *see United States v. Olano*, 507 U.S. 725 (1993), in that the defendant waived his fundamental rights but did not receive the benefit of his bargain in return, *see Santobello*, 404 U.S. 257; *Barnes*, 2002 WL 113825 *3-4.

cannot be reconciled with that of the Eighth, Ninth and Tenth Circuits.[3]

Without the plea bargaining process, the criminal justice system would come to a standstill. However, plea agreements require defendants to waive fundamental constitutional rights. *See Santobello*, 404 U.S. at 264 (Douglas, J., concurring) (by plea bargaining a defendant waives his right to a jury trial, confrontation, presentation of witnesses, remain silent, and to be convicted by proof beyond a reasonable doubt); *Barnes*, 2002 WL 113825 *3-4. Defendants rely on all parts of a plea agreement in deciding to waive those fundamental rights – not just the ultimate sentence recommendation by the government. When a prosecutor fails to perform the government's obligation under a plea agreement, the defendant's fundamental rights have been violated. *See Santobello*, 404 U.S. at 267 (Douglas, J., concurring). Prosecutors must

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[3] It appears that the First Circuit also required that the government's improper allocution actually influence the sentencing judge: "The trial judge simply accepted the recommendation of the government, apparently because he believed that a sentence at the high end of the guideline range was appropriate." [App. 6]. If so, the First Circuit's decision also conflicts with the decisions of two circuits. *See Hawley*, 93 F.3d at 693-94 (under *Santobello* the defendant was entitled to relief for the government's breach of the plea agreement "regardless of whether the government's conduct actually influenced the sentencing judge"); *United States v. Cohen*, 593 F.2d 766, 772 (6th Cir. 1979) ("touchstone of *Santobello* is whether the prosecution met its commitment and not whether the court would have adopted the government's recommendation," so "the Parole Board's awareness of and/or disinclination to adopt the terms and conditions of the plea agreement would be irrelevant").

therefore be held to the highest standard in performing the government's part of those agreements. *E.g., Mondragon*, 228 F.3d at 981. Any ambiguities in the language of an agreement must be construed in favor of the defendant, *e.g., United States v. Camarillo-Tello*, 236 F.2d 1024, 1026 (9th Cir. 2000), especially where, as here, the defendant would otherwise receive little or no benefit from the bargain.

In four circuits, defendants can count on judges to enforce all parts of the plea agreement. In the First Circuit they cannot. In the First Circuit prosecutors can argue facts directly contrary to those stipulated in the plea agreement signed by the government attorney. In the First Circuit, according to this published opinion, as long as the government's ultimate sentence recommendation was contemplated by the plea agreement, the government has "fulfilled its obligation" to the defendant and the court. This disturbing and dangerous precedent threatens the entire plea bargaining process. This Court should resolve the inter-circuit conflict on this issue that affects the fundamental fairness and integrity of our justice system.

CONCLUSION

For the reasons stated above, ELLIOT GIRAUD-PINEIRO respectfully petitions this Court for a writ of certiorari.

Respectfully submitted,

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United States Court of Appeals
For The First Circuit

No. 01-1298

UNITED STATES,

Appellee,

v.

ELLIOT GIRAUD-PINEIRO, A/K/A PIVI,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Hon. José Antonio Fusté, *U.S. District Judge*]

Before

Selya, *Circuit Judge*,
Stahl, *Senior Circuit Judge*,
and Doumar,* *Senior District Judge*.

Howard M. Srebnick, *Christine Ng*, and *Black, Srebnick & Kornspan, P.A.*, on brief for appellant.

Nelson Perez-Sosa, Assistant United States Attorney, with whom *Guillermo Gil*, United States Attorney, and *Jorge E. Vega-Pacheco* were on brief for appellee.

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* Of the Eastern District of Virginia, sitting by designation.

October 19, 2001

STAHL, *Senior Circuit Judge*. The defendant, Elliot Giraud-Pineiro, pled guilty to conspiracy to possess cocaine with intent to distribute and conspiracy to finance illegal narcotics transactions. He now appeals his sentence. For the following reasons, we affirm.

I.

In a multi-count indictment that named numerous co-defendants, Giraud-Pineiro was charged in three counts: Count One alleged that the defendants conspired to possess with intent to distribute more than five kilograms of cocaine and more than one kilogram of heroin in violation of 21 U.S.C. §§ 841(a)(1) and 846; Count Two alleged that the defendants conspired to finance these illegal transactions in violation of 18 U.S.C. § 1956; and Count Six was a forfeiture count.

Defendant initially pled not guilty to these charges. On May 17, 2000, Giraud-Pineiro and the government entered into a plea agreement, in which he agreed to plead guilty to the offenses charged in Counts One and Two of the indictment. The plea agreement states that the defendant was originally indicted for possessing more than five kilograms of cocaine, and incorporates a factual statement that the conspiracy involved hundreds of kilograms of cocaine and that the defendant's role was to finance the cocaine shipments and manage the financial transactions so as to conceal the illegal proceeds. In return for his guilty plea, the government agreed that the

defendant would "be held accountable in determining the applicable guideline range to at least three point five (3.5) but less than five (5) kilograms of cocaine." This stipulation had the effect of decreasing defendant's penalty exposure from ten years to life imprisonment, *see* 21 U.S.C. § 841(b)(1)(A), to a range of five to forty years, *see* 21 U.S.C. § 841(b)(1)(B). In the plea agreement, it was agreed that the applicable offense level for the more serious count in the indictment (Count One) would be 30,[1] translating into a sentencing range of 97 to 121 months for a defendant with no prior criminal history. Based on this calculation, the government agreed that it would recommend to the Court a sentence of 120 months.[2]

At the change-of-plea hearing, the district court advised the defendant about the consequences of pleading guilty, and informed him that, as Count One of the indictment reads, it carried a mandatory minimum term of ten years to a maximum of life imprisonment. However, the district court specifically noted that the plea agreement stated that the government would only attribute to defendant an amount of cocaine of at least 3.5 kilograms but less than five kilograms. The defendant confirmed that this was his understanding. Satisfied that the decision of the defendant was made knowingly and voluntarily, the district court accepted the change of plea.

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[1] This offense level was calculated by using a base offense level of 30, applicable for the 3.5 to less than five kilogram quantity, minus three levels for acceptance of responsibility, plus three levels for defendant's role in the offense.

[2] The plea agreement left defendant free to argue for a sentence at the lower end of the applicable guideline range.

The probation office's presentence report recognized that the defendant had pled guilty to the offenses listed in the indictment, but that the plea agreement stipulated to a lesser quantity of drugs. The report also confirmed the government's calculation of the base offense level (30) and criminal history category (I), indicating a guideline range of 97 to 121 months imprisonment, with an applicable five-year mandatory minimum. The district court accepted the recommendation of the probation office and adopted its calculations as the applicable guideline range in this case. At sentencing, as agreed, the government recommended that the defendant be sentenced to a term of 120 months. The defendant was then sentenced to a term of 120 months on Counts One and Two, to be served concurrently, followed by five years of supervised release.

II.

Giraud-Pineiro appeals his sentence, claiming that the prosecutor breached the plea agreement by suggesting that he was, in fact, responsible for "hundreds" of kilograms of drugs, directly contradicting the amount stipulated by the parties. Defendant emphasizes that during the sentencing hearing the government claimed that he had pled guilty to more than five kilograms of cocaine, and, as a result, the court sentenced him to the mandatory minimum of 120 months for the sale of more than five kilos. As a result, Giraud-Pineiro insists that he is entitled to a new sentencing hearing before a different judge.

This court exercises plenary review over the issue of whether the government has breached a plea agreement. *See United States v. Clark*, 55 F.3d 9, 11 (1st Cir. 1995). However, we review only for plain error when the defendant has knowledge of the conduct that purportedly amounts to a breach of the plea agreement, but nevertheless fails to bring it to the attention of the district court, as is the case here. *See United States v. Saxena*, 229 F.3d 1, 5 (1st Cir. 2000) (citing, *inter alia*, *Johnson v. United States*, 520 U.S. 461, 466 (1997)).

We are satisfied that there was no breach of the plea agreement in this case. The government fulfilled its obligation under the plea agreement when it recommended a sentence of 120 months. Even though Giraud-Pineiro pled guilty to Count One of the indictment, which stated that the offense involved more than five kilograms of cocaine, the judge made clear at the change-of-plea hearing that he would only hold the defendant responsible for an amount greater than 3.5 kilograms but less than five kilograms in accordance with the joint stipulation.[3] Likewise, at the sentencing hearing, the judge emphasized that he was only taking into account the lesser amount of drugs, as reflected in the plea agreement, when making his sentencing determination.[4] Nothing in the transcript

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[3] ("Regarding guidelines, you're going to be held liable for at least 3.5, but less than five kilos of cocaine. . . . There is together to be a recommendation that you be sentenced in both cases to 120 months.").

[4] ("[Defendant] stipulated to an amount of drug [sic], and he's going to walk out the door sentenced to that amount of drugs. . . . "); ("[Defendant] stipulated that he was responsible

suggests that the sentencing judge believed that the statutory mandatory minimum of ten years was applicable to defendant's case. Nor did the sentencing judge indicate that he was influenced by the fact that, in the absence of the stipulation, the defendant would have been subject to the ten-year mandatory minimum. The trial judge simply accepted the recommendation of the government, apparently because he believed that a sentence at the high end of the guideline range was appropriate.

III.

Having found no error in the proceedings below, we hereby affirm the sentence imposed by the district court.

Affirmed.

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for at least 3.5 but less than 5 kilos of cocaine, and that gives us a base level of 30 under guideline section 2D1.1.").

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 01-1298

UNITED STATES,
Appellee,

v.

ELLIOT GIRAUD-PINEIRO, A/K/A PIVI
Defendant, Appellant.

JUDGMENT

Entered: October 19, 2001

This cause came on appeal on the briefs and original record from the United States District Court for the District of Puerto Rico.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The Judgment of the district court is affirmed.

By The Court
Janice O'Neil, Acting Clerk.

By: Julie Gregg
Julie Gregg, Appeals Attorney

[cc: Mr. Srebnick and Mr. Perez-Sosa]

UNITED STATES DISTRICT COURT

FOR THE District of PUERTO RICO

UNITED STATES OF AMERICA

V.

ELLIOT GIRAUD-PIÑEIRO
a/k/a "PIVI"
T/N: ELLIOT JIRAU-PIÑEIRO

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 99-CR-125-03 (JAF)
NICHOLAS VELEZ & LYDIA LIZARRIBAR, ESQS.
Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s) ONE & TWO ON 05-17-2000.

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Concluded	Count Number(s)
21:846	Conspiracy to possess with intent to distribute more than 3.5, but less than 5 kilograms of cocaine. A Class "A" felony.	05-05-99	ONE
21:1956(a)(1)(B)(i)	Laundering of monetary instruments a Class "C" felony.	05-05-99	TWO

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

X Count(s) SIX X is [illegible] are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. 598-01-9981

Defendant's Date of 07-30-68

Defendant's USM No.: 17561-069

Defendant's Residence Address:

BARRIO LAS CANELAS, CALLE SANTA INES

CALLE SANTA INES #10100

ARECIBO, PR

Defendant's Mailing Address:

----SAME AS ABOVE------

DECEMBER 20, 2000
Date of Imposition of Judgment

/s/ Jose A. Fuste
Signature of Judicial Officer

JOSE A. FUSTE, U.S. DISTRICT COURT
Name and Title of Judicial Officer

12/27/00
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total total term of 120 MONTHS AS TO EACH COUNT (1 & 2) TO BE SERVED CONCURRENTLY WITH EACH OTHER.

REQUEST FOR VOLUNTARY SURRENDER IS DENIED BY THE COURT

X The court makes the following recommendations to the Bureau of Prisons:
Defendant be allowed to serve his sentence somewhere in the South-Eastern portion of the United States.

X The defendant is remanded to the custody of the United States Marshal

The defendant shall surrender to the United States Marshal for this district:

[ ] at _____ [ ] a.m. [ ] p.m. on _____.
as notified by the United States Marshal:

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
_____
Deputy U.S. Marshall

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for FIVE (5) YEARS AS TO EACH COUNT (1 & 2) TO BE SERVED CONCURRENTLY WITH EACH OTHER.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

future substance abuse. (Check, if applicable.)

[ ] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant shall not commit any crimes, federal, state, or local, and shall comply with the standard conditions of Supervised Release promulgated by the United States Sentencing Commission and adopted by this Court.

2. The defendant shall not unlawfully possess a controlled substances.

3. The defendant shall refrain from possessing firearms, destructive devices, or other dangerous weapons.

4. The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on supervised releases, at least two (2) periodic tests thereafter, and whenever requested by the U.S. Probation Officer. If any such samples detect substance abuse, that the defendant participate in a substance abuse treatment program arranged and approved by the U.S. Probation Office until duly discharged by authorized program personnel with the approval of the U.S. Probation Officer.

5. The defendant shall provide the U.S. Probation Officer access to any financial information upon request.

6. The defendant shall produce evidence to the U.S. Probation Officer to the effect that income tax returns have been duly filed with the Commonwealth of Puerto Rico Department of Treasury as required by law.

The Court orders the forfeiture of all property, real and personal, involved in this case pursuant to the provisions of Title 18, U.S. Code § 853.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$200.00	$	$

[ ] If applicable, restitution amount ordered pursuant to plea agreement ..... $_____

FINE

The above fine includes costs of incarceration and/or supervision in the $_____.

The defendant shall pay interest on any fine more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred _____. An Amended Judgment in a Criminal Case will be entered after such determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of	Amount of Restitution	Priority Order or Percentage of Payment
Totals:	$_____	$_____	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual finding and guideline application in the presentence report except (see attachment, if

Guideline Range Determined by the Court:

Total Offense 30

Criminal History 1

Imprisonment 97 to 121 months

Supervised Release ------ to AT LEAST 4 years

Fine Range: 15,000.00 to $2,000,000.00

X Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: NONE

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the

payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to the sentence called for by the application of the guidelines.

OR

X The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the

OR

The sentence departs from the guideline range:

[ ] Upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s): DOWNWARD DEPARTURE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, Plaintiff, v. [3] ELLIOT GIRAUD-PINERO Defendant.	CRIMINAL NO. 99-125(JAF)

PLEA AND FORFEITURE AGREEMENT

TO THE HONORABLE COURT:

COMES NOW the United States of America, by and through its attorneys, Guillermo Gil, United States Attorney for the District of Puerto Rico, Jorge E. Vega Pacheco, Assistant U.S. Attorney, Chief, Criminal Division, and Sonia I. Torres, Assistant United States Attorney for said District and the defendant, Elliot Giraud-Piñero, and the defendant's counsel, Lydia Lizarribar, Esq., pursuant to Rule 11(e)(1)(A) and (B) of the *Federal Rules of Criminal Procedure*, and state to this Honorable Court, that they have reached an agreement, the terms and conditions of which are as follows:

1. The defendant, Elliot Giraud-Piñero, agrees to plead guilty to Count One and Count Two of the pending indictment. Count One charges the defendant that from on or about a date unknown but not later than a day in 1991 to on or about the return of this indictment he willfully, knowingly, unlawfully, and intentionally conspired with Samuel Robles Ramos, Antonio Robles Ramos, Juan Leon-Serrano, Eugenio Gonzalez Quiñones and others known and unknown to the Grand Jury, to

commit an offense against the United States, to wit: posses [sic] with intent to distribute more than five (5) kilograms of cocaine, a Schedule II Narcotic Drug Controlled Substance and more than one (1) kilogram of heroin, a Schedule I Narcotic Drug Controlled Substances. All in violation of Title 21 *United States Code*, Sections 841(a) (1) and 846.

Count Two charges the defendant that from on or about a date unknown but not later than a day in 1991 to on or about the return of this indictment he willfully, knowingly, unlawfully, and intentionally conspired with Samuel Robles Ramos, Antonio Robles Ramos, Juan Leon-Serrano, Eugenio Gonzalez Quiñones and others known and unknown to the Grand Jury, to commit an offense against the United States, to wit: to knowingly conduct or attempt to conduct financial transactions, knowing that the proceeds involved in the financial transactions represented the proceeds of some form of unlawful activity, when the financial transactions in fact involved the proceeds of a specified unlawful activity to wit: the distribution, sale and otherwise dealing in narcotics or other dangerous drugs to wit: more than five (5) kilograms of cocaine, a Schedule II Narcotic Drug Controlled Substance and more than one (1) kilogram of heroin, a Schedule I, Narcotic Drug Controlled Substance in violation of Title 21 *United States Code*, Sections 841(a)(1) and 846, with the intent to promote the carrying on of specified unlawful activity and knowing that the transactions are designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of a specified unlawful activity, contrary to the

provisions of Title 18 *United States Code*, Section 1956 (a)(1)(B)(i).

2. The penalty for Count I is a mandatory minimum term of TEN (10) years of imprisonment, and a maximum of LIFE IMPRISONMENT, a fine not to exceed FOUR MILLION dollars ($4,000,000.00) dollars, and a term of supervised release of not less than FIVE (5) years in addition to any term of incarceration. The defendant cannot be placed on probation nor have the imposition or execution of the sentence suspended. Further, the defendant acknowledges that parole has been abolished.

The penalty for Count Two is a fine of not more than FIVE HUNDRED THOUSAND ($500,000) dollars or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than TWENTY (20) years, or both and a term of supervised release of not more than THREE (3) years.

3. Prior to the sentencing hearing the defendant will pay a special monetary assessment of one hundred dollars ($100.00) per count as required by Title 18, *United States Code*, Section 3013(a).

4. The defendant is aware that the Court may, pursuant to Section 5E1.2(i) of the *Sentencing Guidelines Manual*, order the defendant to pay a fine sufficient to reimburse the government for the costs of any imprisonment, probation or supervised release ordered.

5. The defendant agrees that any fine or restitution imposed by the Court will be due and payable immediately.

6. [Forfeiture Provisions which are irrelevant to issues on appeal and include legal property descriptions in Spanish are omitted.]

8. Subject to the provisions of paragraphs 1 through 8 herein, the United States and the defendant agree to the following guideline calculations:

a. That for Count I he is to be held accountable in determining the applicable guidelines range to at least three point five (3.5) kilograms but less than five (5) kilograms of cocaine.

b. That pursuant to U.S.S.G. § 2D1.1 and based on the above stipulated amount of narcotics the base offense level is THIRTY (30).

c. The base offense level shall be reduced by THREE (3) levels, should the defendant accept responsibility pursuant to U.S.S.G. § 3E1.1 as amended.

d. The base offense level shall increase by THREE (3) levels for defendant's role in the offense pursuant to U.S.S.G. § 3B1.1(c).

e. At this time the total adjusted base offense level is THIRTY (30).

f. There shall be no further adjustments or departures to the base offense level.

g. The parties do not stipulate any assessment as to defendant Elliot Giraud-Piñero' criminal history category.

h. The parties agree that pursuant to U.S.S.G. § 2S1.1(a) the base offense level for Count Two is TWENTY-THREE (23).

i. The base offense level shall be increased by THREE (3) levels as the defendant was aware that the funds were from narcotics.

j. The base offense level shall be further reduced by THREE (3) levels, should the defendant accept responsibility pursuant to U.S.S.G. § 3E1.1 as amended. The total adjusted level for Count Two will be TWENTY-THREE (23).

k. The defendant is aware that the United States will recommend to the Court a sentence of **ONE HUNDRED and TWENTY (120) MONTHS** and the defendant will argue for a sentence at the lower end of the applicable guideline range. Further, the United States will not oppose defendant's request to be allow to voluntary surrender to the institution designated by the Bureau of Prisons.

9. Defendant Elliot Giraud-Piñero, is fully aware that the Court is not bound by this plea agreement, including but not limited to: sentencing guidelines calculations, stipulations, dismissal of the remaining counts, and/or sentence recommendation.

10. Whether any party has breached any provision of this plea agreement, if contested, shall be determined by the Court in an appropriate proceeding at which the defendant's and United States' disclosures and documentary evidence shall be admissible and at which the contested party shall be required to establish a breach of the plea agreement by a preponderance of the evidence.

11. Whether any party has breached any provision of this plea agreement, if contested, shall be determined by the Court in an appropriate proceeding at which the

defendant's and United States' disclosures and documentary evidence shall be admissible and at which the contested party shall be required to establish a breach of the plea agreement by a preponderance of the evidence.

12. The United States reserves the right to carry out its responsibilities under guidelines sentencing. Specifically, the United States reserves the right: (a) to bring its version of the facts of this case including its file and any investigative files to the attention of the probation office in connection with that office's preparation of a presentence report; (b) to dispute sentencing factors or facts material to sentencing; (c) to seek resolution of such factors or facts in conference with opposing counsel and the probation office.

13. The defendant Elliot Giraud-Piñero represents to the Court that he is satisfied with his attorney, Lydia Lizarribar, Esq., and indicates that she has rendered effective assistance. Defendant understands that by entering into this agreement, defendant surrenders certain rights as provided in this agreement. Defendant understands that the right of criminal defendants include the following:

a. If the defendant had persisted in a plea of not guilty to the charges, defendant would have the right to a [sic] continue his speedy jury trial as commenced, with the assistance of counsel. The trial may be conducted by a judge sitting without a jury if the defendant, the United States and the judge agree.

b. If the jury trial continues as initiated, the jury would be composed of twelve lay persons selected at random. The defendant and defendant's attorney would assist in selecting the jurors by removing prospective

jurors for cause where actual bias or other disqualification is shown, or by removing prospective jurors without cause by exercising peremptory challenges. The jury would have to agree, unanimously, before it could return a verdict of either guilty or not guilty. The jury would be instructed that the defendant is presumed innocent, that it could not convict the defendant unless, after hearing all the evidence, it was persuaded of the defendant's guilt beyond a reasonable doubt, and that it was to consider each charge separately.

c. If a trial is held by the judge without a jury, the judge would find the facts and, after hearing all the evidence and considering each count separately, determine whether or not the evidence established the defendant's guilt beyond a reasonable doubt.

d. At a trial, the United States would be required to present its witnesses and other evidence against the defendant. The defendant would be able to confront those witnesses and defendant's attorney would be able to cross-examine them. In turn, the defendant could present witnesses and other evidence in defendant's own behalf. If the witnesses for the defendant would not appear voluntarily, defendant could require their attendance through the subpoena power of the Court.

e. At the trial, the defendant could rely on the privilege against self-incrimination to decline to testify, and no inference of guilty could be drawn from his refusal to testify. If the defendant desired to do so, the defendant could testify in the [sic] his own behalf.

14. The accompanying Statement of Facts signed by the defendant is hereby incorporated into this plea agreement. Defendant adopts the Statement of Facts and agrees that the facts therein are accurate in every respect and, that had the matter proceeded to trial, the United States would have proved those facts beyond a reasonable doubt.

15. This plea agreement binds only the United States Attorney's Office for the District of Puerto Rico and the defendant; it does not bind any other federal district, state or local authorities.

16. This written agreement constitutes the complete Plea Agreement between the United States, the defendant, and the defendant's counsel. The United States has made no promises or representations except as set forth in writing in this plea agreement and deny the existence of any other term and conditions not stated herein.

17. No other promises, terms or conditions will be entered unless in writing and signed by all parties. The defendant acknowledges that no threats have been made against the defendant and that the defendant is pleading guilty freely and voluntarily because the defendant is guilty.

RESPECTFULLY SUBMITTED.

GUILLERMO GIL
United States Attorney

/s/ Jorge E. Vega-Pacheco
Jorge E. Vega-Pacheco
Assistant U.S. Attorney
Chief, Criminal Division
Dated: 5/17/00

/s/ Lydia Lizarribar
Lydia Lizarribar, Esq.
Counsel for Defendant
Dated: 5/17/00

/s/ Miguel A. Periera
Miguel A. Periera
Assistant U.S.
Attorney
Deputy, Chief
Criminal Division
Dated: 5/17/00

/s/ Sonia I. Torres
Sonia I. Torres
Assistant U.S.
Attorney
Dated: 5/17/00

/s/ Elliot Giraud-Piñero
Elliot Giraud-Piñero
Defendant
Dated:

I have consulted with my counsel and fully understand all my rights with respect to the Indictment pending against me. Further, I have consulted with my attorney and fully understand my rights with respect to the provision of the *Sentencing Guidelines, Policy Statements, Application, and Background Notes* which may apply in my case. I have read this Plea Agreement and carefully reviewed every part of it with my attorney. I fully understand this agreement and I voluntarily agree to it.

Date: _____ /s/ Elliot Giraud-Piñero
Elliot Giraud-Piñero
Defendant

I am the attorney for Elliot Giraud-Piñero. I have fully explained to the defendant the defendant's rights with respect to the pending indictment. Further, I have reviewed the provisions of the *Sentencing Guidelines, Policy Statements, Application, and Background Notes*, and I have fully explained to the defendant the provisions of those guidelines which may apply in this case. I have

carefully reviewed every part of this Plea Agreement with the defendant. To my knowledge, the defendant is entering into this agreement voluntarily, intelligently and with full knowledge of all consequences of her plea of guilt.

Date: May 17, 2000 /s/ Lydia Lizarribar
Lydia Lizarribar, Esq.
Counsel for Defendant

STATEMENT OF FACTS

Pursuant to Rule 418 Local Rules of the Court for the District of Puerto Rico, a stipulated statement of facts is hereby filed, setting forth the facts comprising the relevant conduct leading to the acceptance of responsibility by the defendant.

That during the period charged in the indictment the defendant conspired with Samuel Robles Ramos, Eugenio Gonzalez, Antonio Robles Ramos, Carlos Hernandez, Roberto Hernandez, and all others mentioned in indictments 99-125 (JAF) and 99-250 (DRD) to import into the District of Puerto Rico hundreds of kilograms of cocaine. The defendant participated in the conspiracy in that he financed shipments of cocaine. The defendant conducted financial transactions with the money obtain by the importation and sale of cocaine. He would also conduct financial transactions with the intent to conceal the proceeds obtained through the importation and distribution of narcotics.

GUILLERMO GIL
United States Attorney

/s/ Sonia I. Torres
Sonia I. Torres
Assistant U.S.
Attorney
Dated: 5/17/00

/s/ Lydia Lizarribar
Lydia Lizarribar, Esq.
Counsel for Defendant

/s/ Elliot Giraud-Piñero
Elliot Giraud-Piñero
Defendant
Dated:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,	No. 95-125
v.	Hato Rey, Puerto Rico
ELLIOT GIRAUD PINERO,	December 20, 2000
Defendant.	

TRANSCRIPT OF SENTENCING HEARING

BEFORE THE HONORABLE JOSE ANTONIO FUSTE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	SONIA TORRES, AUSA US Attorney's Office
For the Defendant:	LYDIA LIZARRIBAR, ESQ.
Court Reporter:	Donna W. Dratwa, RMR, CRR

[2] PROCEEDINGS

* * *

THE CLERK: Yes, Your Honor. For sentence, Criminal 99-125, United States of America versus Elliot Giraud Pinero. Appearing on behalf of the government, the Assistant US Attorney Sonia Torres, and appearing on behalf of the defendant, Attorney Lydia Lizarribar.

MR. VELEZ: Good afternoon, Your Honor. The United States is ready to proceed.

THE CLERK: Counselor, may I have your name for the record.

MR. VELEZ: Nicholas Velez. For the record, I'm of counsel to Lydia Lizarribar. Judge, if it please the Court, I beg the Court's indulgence. Ms. Lizarribar went to advise another court that she was here. She should be back any minute.

THE COURT: Who is going to take care of the sentence, you or her?

MR. VELEZ: As the Court knows, I filed a motion on the Apprendi versus New Jersey, and I'm here for the purposes of addressing those issues to the Court and have to respond to questions the Court may have. I did file a motion, in connection, with this bench on the 17th of last month.

THE COURT: So let me first ask this. What [3] objections are there now to the presentence report, any? What objection do we have pending regarding the presentence report?

MR. VELEZ: Well, in my motion, I address a series of objections that I have with respect to not only this particular report, but with respect to any report in any conspiracy case that does not attribute a given quantity of drugs to the defendant.

In this particular case, as the Court is aware, the defendant entered into a plea agreement with the government. That plea agreement is entered into prior to the Apprendi decision, when that plea agreement was entered into.

The defendant, through his counsel, stipulated to a certain range of drugs, which was between 3.5 kilos but not to exceed five kilos. That amount of drugs, I submit to

Your Honor, was entered into as a result of negotiations with the government.

THE COURT: Excuse me a minute.

Would the defendant and the interpreter move to this side, and have the interpreter come to this side. I'm getting all of your translations into the microphone.

MS. LIZARRIBAR: Good afternoon. Let the record show that I am here.

THE COURT: Let's continue, Counsel. There was a [4] stipulation, 3.5, not more than five kilos for plea bargaining purposes.

MR. VELEZ: That's correct. Now, that is being interpreted by the United States probation department – I assume also by the United States government – as constituting a specific amount of drugs. At the time that – that was entered into it, there was a further stipulation that that would start the guideline range at a level of 30.

What I'm suggesting, and what I'm stating to this Court is that, notwithstanding that, given the holding in Apprendi that the defendant, A, could not have entered into an agreement to plead to that charge because that charge, first of all, was not specific with respect to the amount of drugs that was attributable, if any, to him. The defendant basically enters a plea of guilty to an 841(a)(1), and the government seeks to create a benefit to the defendant in the form of a reduction of the quantity which would expose the defendant, under the old statute, to a five-to-life sentence, or, under the new statute, to the five to 40 sentence, under the recent sentencing statutes.

The defendant here pleading to the indictment, place him in a position that since there was no mention of quantity of drug attributable to the defendant in the [5] indictment – in the indictment, he could not plead to something that was not there.

He could not – so that his plea, although it's a satisfactory plea since all of the elements were made out that he entered into the conspiracy, the amount of drugs was left and should have been left at that time for a factual hearing that would have taken place.

THE COURT: Don't you think when somebody pleads and enters into a factual stipulation of the nature that he entered into, that he is, indeed, whether you like it or not, complying with the Apprendi principle, which does not leave it up in the air, necessarily, how much drugs they're responsible for?

MR. VELEZ: If we're talking about 3.5 and 5 kilograms – and what I'm suggesting is that that wasn't done for the purpose of the defendant establishing his connection with drugs. That was done, rather than having the defendant plead to 841(b), it was a way of the government going around him pleading to an 841(b), instead, to let him plead to an 841(a), which is what he pled to, but they restrict the sentence sequences to him, so that he gets the benefit of a five-year minimum versus a ten-year minimum.

THE COURT: What are you trying to tell me, that the drug may be less than 3.5?

[6] MR. VELEZ: I suggest that what the defendant had in this particular case was a naked conspiracy, a

common-law conspiracy. And since it was a common-law conspiracy, you really can't sentence him.

THE COURT: How can you say that it was a common-law conspiracy if he pled to 841 US 6, it couldn't be a common-law conspiracy.

MR. VELEZ: There was no statement in the indictment concerning the amount of drugs that was attributable to him, and under Apprendi versus United States, in Judge Thomas's decision, that's an item that constitutes an element of a crime. In that indictment, there is no mention of a quantity of drug attributable to him. There is a mention of a quantity of drugs in excess of five kilos, which encompasses all of the defendants in here.

And generally what we do, as the Court is aware of, we have a determination in the form of a factual hearing to determine precisely the amount that's attributable to the defendant. I am submitting that that agreement that was entered into, which in hindsight is – constitutes a mutual error between both the government and the defendant.

THE COURT: I think you will have to go all the way to Justice Thomas to get that from me. I'm not going to [7] give you that.

I think that you are stretching argument beyond the point of reality by saying what you're saying. This man stipulated an amount of drug, and he's going to walk out the door sentenced to that amount of drugs, simple as that. And your record is preserved, I've heard it, that's it. Next objection.

MR. VELEZ: If I may just grab my file a moment, Judge, so that I can proceed.

THE COURT: Sure.

MR. VELEZ: Your Honor, may the United States address that point, or should we wait for defense counsel?

THE COURT: Let him finish. I want to see a copy of the plea agreement, by the way.

What is the other objection?

MR. VELEZ: I have a series of objections that are contained in my memorandum –

THE COURT: Let's discuss them one by one now.

MR. VELEZ: – dated November 17th.

THE COURT: Tell me which is the next one.

MR. VELEZ: Setting aside the Court's position here in connection with the quantity of drugs, my position at that point is fairly clear, that I don't believe that that was the quantity – since that was not proved beyond [8] a reasonable doubt –

THE COURT: Counsel, I already said that that is done and over with.

What else?

MP.. VELEZ: The defendant is also charged, Judge, in count two of the indictment, with money laundering. In connection with the money laundering statute, I simply wanted to point out to the Court that I believe

that their money laundering should not be allowed at this time because the money-laundering charge, as charged in the indictment, does not contain an amount of money that corresponds to the amount of money-laundering by the defendant.

THE COURT: So what are you trying to tell me? He pled guilty to that count, right?

MR. VELEZ: He pled guilty. But the Court is in a position to determine whether it – or not it was sufficient evidence at the time that the defendant pled guilty and whether or not the sufficiency of that count warrants the defendant being sentenced under that count.

THE COURT: According to the stipulated facts of this case, he participated in a drug conspiracy, to import into this district hundreds of kilograms of cocaine. It's black and white, the plea agreement. The defendant participated in the conspiracy in that he [9] financed shipments of cocaine.

He conducted financial transactions with the money obtained by the importation and sale of cocaine, and he would conduct financial transactions with the intent to conceal the proceeds obtained through the importation and distribution of narcotics.

Not only that, but the plea agreement contains a listing of the properties that are involved in such a situation. As a matter of fact, we have here one, two, three, four, five, six real properties. So what's wrong with the plea?

MR. VELEZ: What is the amount of money that was laundered by the defendant, Judge?

THE COURT: What did he plead to, 1956(a)(1)(B)(i)?

Take a look at section 1956(a)(1)(B)(i), and tell me a conviction under that sentence relates to any particular amount.

MR. VELEZ: Judge, the criteria is that there has to be a known amount. There was never a known amount in this case, and that's why there were substitute properties that were given to the government under this plea agreement. Not only that, it was clear by looking at the description of the properties and – that the interest of the defendant in those properties was limited because of the ownership of the property, jointly, with [10] his wife.

And since she wasn't charged in this indictment, the government now finds itself in the quagmire of the inability to obtain these properties because she was not named in this indictment, and because – therefore, they could not forfeit her property rights under this agreement or under a civil proceeding. And those properties were not obtained as a result of any illegal funds that were generated by this defendant.

THE COURT: He pled guilty to count two.

MR. VELEZ: I understand the fact that he pled guilty, Judge, but I think I believe it's Rule 5 – Rule 7, if I may. Under Rule 7 he has to establish at the time of plea what his interest is in the property.

THE COURT: His interest by law is 50 percent.

MR. VELEZ: I don't know that from a reading of the information contained. I don't know whether or not, nor does the government, nor is there anything to

establish whether or not he owns a 50-percent interest or his wife obtains a 50-percent interest in either case?

THE COURT: Counsel, is it jointly owned by them?

MR. VELEZ: Yes.

THE COURT: They are married and –

MR. VELEZ: Yes, they are.

THE COURT: By basic dispositions of the Puerto [11] Rico Civil Code, it is 50, 50.

MR. VELEZ: I won't argue that issue with the Court. I only question whether or not it's possible under Puerto Rico law that the defendant could own a greater interest, even though the property is owned jointly.

If they own it jointly by the entirety, then certainly that would be the case for purposes of – inheritance purposes and for purposes of the other party obtaining the property rights to it.

THE COURT: Puerto Rico is a community property jurisdiction established by virtue of law on a 50, 50 basis.

Any other objection?

MR. VELEZ: I wanted to point out that I want to make a representation – not a representation, an argument to the Court which I feel, given the Judge's initial ruling, I'm precluded by that – which addresses the issues as to why the defendant should commence at a level 12 for purposes of the guideline range. Obviously, this Court is denying me that.

THE COURT: You're actually telling me that he's responsible for less drugs than what he stipulated to?

MR. VELEZ: That's correct.

THE COURT: That will not be allowed. That is [12] foreclosed.

MR. VELEZ: I think I've made my objection clear to that.

THE COURT: Yes.

MR. VELEZ: I similarly object to the fact that, although the defendant pled to a guideline range, you gave him an additional three points, that the issue of creating a managing role is an element of a crime that should have also been pled and proved in this case. Since that was not done, his allocution to the fact that he was a manager should not have been permitted since he violated the Apprendi rule in this case.

THE COURT: It was the same argument as to the drug amount. And he sat down, through his attorney, with the US government and he struck this bargain for him. He agreed that he was a three-point type of manager or supervisor, and that's exactly what he's going to get.

Who was his lawyer during the change-of-plea hearing?

MS. LIZARRIBAR: I was, Your Honor.

THE COURT: And you are his co-counsel?

MS. LIZARRIBAR: Yes, Your Honor, I am.

THE COURT: Very well. How do you react to some attorney taking this diametrically opposed views to what you pled for? Are you telling me that what you pled this [13] man to is all wrong?

MS. LIZARRIBAR: No. I think that was the best deal at that time that I could do for him. At that time, that was the best deal that I could do for him, and I met on many, many, times with the government, and I thought that was the best deal that I cold get for him.

THE COURT: You're still in the case, but obviously somebody is taking a different position.

MS. LIZARRIBAR: Yes, Your Honor.

THE COURT: What else?

MR. VELEZ: If I may, Your Honor, I'm not taking so much a different position, as I am – I'm explaining the dynamics that takes place in the process of entering into plea agreements. And the dynamics of that is at that time neither the government nor the defense counsel had considered the impact that Apprendi would have, and that the purpose of setting forth an amount of drugs and setting forth a guideline range was in order to give the defendant the benefit of the more Draconian status that existed prior to Apprendi versus New Jersey.

THE COURT: Any other objection?

MR. VELEZ: The only other objection that counsel will address – she was present – is that the defendant in this particular case was denied by the government the right to safety valve application as a result of a [14] proffer that he did with the government.

THE COURT: But if he has a managerial role, how could he have the benefit of the safety valve? He's foreclosed by 5C1.2.

MR. VELEZ: Unfortunately, as a result of Your Honor's initial ruling on this, I take issue with it, but it would be foreclosed using that analysis.

THE COURT: Very well. Anything else? Anything else?

MR. VELEZ: I think there are some issues concerning the rest of the report that counsel is going to address. I just wanted to address some of these issues.

THE COURT: Ms. Lizarribar.

MS. LIZARRIBAR: They have been covered. The ones that we have filed have been covered by him. I don't have anything else, except that he be sentenced to the lower end of the guideline.

THE COURT: That is your petition to the Court?

MS. LIZARRIBAR: Yes, Your Honor, lower end of guideline and that he be sent, if possible, to Florida, to the state of Florida.

THE COURT: Let me hear the government now on this issue.

MR. VELEZ: Yes. I'd like the indulgence of the [15] Court just to keep the record clear as to the instant

case. This case was obviously, as the court notes, indicted in May of 1999. from the inception of this case, during the detention hearing, the United States summarized the evidence in its possession against the defendant and made it very clear that this was a drug-smuggling organization and this defendant was responsible for importing not hundreds, but thousands, of kilograms into the district of Puerto Rico.

Later on, the United States, although not required by this Court, provided a bill of particulars to the defendant in which it stated the overt acts in which this defendant specifically participated in. Therein, the Court can see there are at least three overt acts where this defendant imported or attempted to import cocaine shipments into the district of Puerto Rico.

I am stating these things for the record so the record can be clear as to what type of drug-smuggling organization we're speaking about, and the defendant was well aware that he was facing a statutory minimum of ten years and a maximum of life.

The indictment in this case reads that it was a conspiracy to possess over 5 kilograms of cocaine. The plea agreement states that that's what he pled to. He didn't plead to 3.5, he actually pled to possessing over [16] 5 kilograms of cocaine. And the Court – the plea agreement so – states so, and Court advised the defendant that he was facing a statutory minimum of ten years, and a maximum of five. And yes, the plea agreement says an amount stipulated to, but that's not even binding the Court. That was just the recommendation of the parties.

I would like to state also for the record that there was plenty of discovery given in this case. And I met on numerous occasions with Counsel Lizarribar, that is not only a seasoned attorney in this district, but a very competent attorney, and she was made aware of all of the evidence in possession of the United States.

And we will prove beyond a reasonable doubt that this defendant imported thousands of kilograms into the district of Puerto Rico, and therefore, if he had proceeded to trial, he would be starting at a level 38. Complete agreement speaks for itself.

We submit Apprendi doesn't apply because there is a plea agreement, and Apprendi has not even been determined in the First Circuit, if in fact, an amount of narcotics is an element of crime.

As to the managerial role, the version of facts speaks for itself. He financed cocaine shipments. A person that financed cocaine shipments could in fact be [17] an organizer, and he was just granted, as part of the stipulation, to a three-point enhancement. A financier can never be a minimal participant in a drug conspiracy. The Court has seen the fishermen who were sentenced. Those were minor participants.

I would like to add, as to the issue of the safety valve, obviously, it's totally inapplicable. I would like to add more. When he was debriefed, he did not provide truthful information to the United States.

There is one allegation that we do not want to allege, that counsel has not stated but he mentioned in his motion. The defendant alleged that he did not have the

opportunity to review the plea agreement prior to signing same, and somehow implies that we changed the plea agreement later on.

That statement is bluntly false. As this Court knows, and Ms. Lizarribar can attest to this as an officer of this court, normally plea agreements – and in this case, it was signed at the United States Attorney's Office – we need the signature of our supervisors, and it's give [sic] to counsel and the defendants.

And at that time it was filed in court. There are no changes here. And that allegation is totally, bluntly false, that somehow we changed something. And that is the implication, and as to "he didn't read the plea [18] agreement" – and Ms. Lizarribar can attest to the Court that her client did in fact read the plea agreement. This -- she reviewed the plea agreement with the defendant. That is a bizarre statement.

THE COURT: Let's hear Ms. Lizarribar as to that issue.

MS. LIZARRIBAR: As to the safety valve, everything he said there was true. What happened there was they didn't want things that he couldn't say about his family, and that was the issue at that time. Everything that he said was truthful, except that he would not talk about his family. That was at that time.

THE COURT: How do you deal with the fact that if he's a supervisor, he's not entitled to the safety valve?

MS. LIZARRIBAR: I know. I just want to have it clear that what he said at that time to them was true.

THE COURT: What about this allegation that he had no time to read the plea agreement?

MS. LIZARRIBAR: It was read here.

THE COURT: It was read to him?

MS. LIZARRIBAR: Yes.

THE COURT: He had time to read the plea agreement?

MS. LIZARRIBAR: With me, yes.

THE COURT: And I explained it to him.

MS. LIZARRIBAR: Yes. For the record, it is there.

[19] What did happen on that day, Your Honor, was that it went up and down on – I think it was two or three times, making changes to it, but it was read to him, Your Honor.

THE COURT: Thank you.

MS. TORRES: I would also like to add, as to the forfeiture issue, obviously, the defendant pled guilty to the money-laundering account. He agreed to forfeit his properties, as stated in the indictment. And he knew what he was doing, and he did it with the assistance of counsel.

And, in fact, we specifically put into the plea agreement that these properties were being forfeited because they were substitute assets. Ms. Lizarribar wanted it to be very clear on the indictment that that was the cause that we were forfeiting under that modality, so to speak.

THE COURT: And you're respecting the 50-percent interest of the wife?

MS. TORRES: Yes, and it's my understanding that she's already filed a claim as to her part. As to the issue of the safety valve when she was debriefed, there was no intention to comply with the safety valve because he doesn't obviously qualify. And that was done with the interest of probably reaching a different number of years [20] for the parties to recommend to this Court.

MS. LIZARRIBAR: I take issue with that, Your Honor, because at that time we had another plea for less years, and that's why we went ahead for the safety valve at that time.

I'm assuming that he said everything he knew, except he didn't want to talk about his family members. But he doesn't qualify for it because he's a supervisor.

Let's not talk about it any further. That's the end of it.

What else?

MR. VELEZ: I would like to address some of the issues of the defendant. Just briefly, I would like to state to the court, as I did in the sentence of Samuel Robles, this defendant had everything in life. He comes from a good family. He had businesses, and just because of greed, got involved in the traffic of not one, but – not two, but hundreds of kilograms into the district of Puerto Rico.

And it is precisely the drugs that has this country the way it has. And this Court has sentenced the other people in this case. I think almost everybody has been sentenced, and I think there may be still one or two still spending.

And if you compare this defendant with the fishermen and the other people who came before the [21] Court that probably didn't have the opportunities that this defendant had, we think that he should be sentenced to 120 months as an appropriate sentence in this case.

I just want to add one thing further for the Court. This defendant not only came in here and started requesting departures from this Court, although in the plea agreement he stated that he would not request any further departures, he still has not complied with giving any financial statement to the United States, as agreed upon in the agreement. And in the defendant's motion, states that they shouldn't comply, that the Court should not require them to comply. Case is submitted.

THE COURT: Very well. Anything by way of allocution, counsel for the defendant?

MS. LIZARRIBAR: From counsel or from –

THE COURT: From counsel first.

MS. LIZARRIBAR: Your Honor, in this case, we have a very young man who has very small children. And even though he comes from a wealthy family, that should not be taken against him. We have here evidence that he has tried most of his life to work, and work as a farmer, Your Honor, and to have a family and have children.

Whatever he did that was wrong, he has tried very hard to change that and mend that. And that was way behind him when this case was filed. His life after all [22] of those incidents, Your Honor, was the life of a law-abiding citizen.

We ask the Court, eight years, Your Honor, very long time, especially when you have children, one year old, four years old. He will miss, Your Honor, the best years of his children. That is punishment.

THE COURT: But all of those that he involved in this are also missing the same thing.

MS. LIZARRIBAR: Yes, but at this time, he is the one who is here for sentencing, not the others. I am going as to what he will lose, Your Honor, and that is punishment enough. I submit to the court that he should be sentenced to the lower end of the guideline, applicable guideline.

THE COURT: Very well. Do you want to say something in your behalf?

(Defendant testifies through an interpreter.)

THE DEFENDANT: I'd like to say that I am repentant, that's all.

THE COURT: Anything else?

THE DEFENDANT: No.

THE COURT: Sentencing findings are as follows. Elliot Giraud Pinero pled to counts one and two of the indictment on May 17th of this year. He actually pled to violations of 21 US Code, Section 846, and Title 18 of [23] the US Code, Section 1956(a)(1)(B)(i), dotted I.

The offense conduct consists of drug trafficking and money laundering, and both sets of offenses, both counts, were grouped together under guideline section 3D1.1 – 3D1.2(b), and since there is a common element between this money laundering and these drug offenses, we are

basically following – considering it as a single conduct, if you will, one conduct, and we are guiding ourselves by the drug guidelines under 2D1.1, for purposes of the calculation.

He stipulated with the government that he was responsible for at least 3.5 but less than 5 kilos of cocaine, and that gives us a base offense level of 30 under guideline section 2D1.1. The role that this defendant had in that particular conspiracy, to which he pled guilty to, was that of a manager or organizer, pursuant to Guidelines Section 3B1.1(b), a three-level decrease is warranted. He actually stipulated that that was correct at the time that he pled.

Finally, the defendant has accepted responsibility for his involvement in the offense conduct, and we will grant him a three-level decrease, as authorized by guideline section 3D1.1(a) and (b). Those are all the adjustments that must be considered today, none other.

He should be sentenced at a level 30. The criminal [24] history category is one. The guideline imprisonment range is 97 to 121 months. The fine range is 15,000 to 2 million, plus a supervised release term of at least four years.

It is the judgment of this Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 120 months as to each of the counts, one and two, to be served concurrently with each other.

Upon release from confinement, the defendant shall be placed on supervised release for five years as to each of the counts, to be served under the following terms and

conditions: First, the defendant shall not commit another federal, state or local crime and will observe the standard conditions of supervised release recommended by the US Sentencing Commission and adopted by this Court.

The defendant will not unlawfully possess controlled substances, and will refrain from possessing firearms, destructive devices, or other dangerous weapons.

The defendant will refrain from the unlawful use of a controlled substance and will submit to drug testing within 15 days of release, on supervised release, and at least two periodic tests thereafter, whenever requested [25] to do so by the probation officer. If the probation officer understands that he should participate in a substance abuse treatment program, he should participate until he is duly discharged.

The defendant will provide access to the probation officer to financial information upon request. The defendant has the obligation of producing evidence to the US probation officer to the effect that if he earns taxable income, he's filing his income tax returns as required by law. We are making a finding that he doesn't have the ability to pay a fine, and I will order the forfeiture of all the property, real and personal, involved in this case, pursuant to 18 US Code Section 853, and a special monetary assessment is imposed.

The defendant is advised that he has ten days to file a notice of appeal, and the notice of appeal can get both his conviction, and his plea reviewed, if the plea was involuntarily obtained, or if the sentence was imposed in violation of the law, the guidelines or was otherwise unreasonable.

Time that he may have served in pretrial detention will be credited toward his sentence. If he's unable to pay the cost of the appeal, he may apply for leave to appeal in forma pauperis. He may also apply to receive benefits under the Criminal Justice Act.

[26] Anything else?

MS. LIZARRIBAR: We have agreed in this case to a voluntary surrender, Your Honor, for this defendant. We ask that it be granted at this time. And as I said before, that he be sent to, if possible, Florida, which is the closest to the island.

THE COURT: Government?

MR. VELEZ: Pursuant to the agreement, that is what we had agreed.

THE COURT: Probation Officer.

(Sidebar discussion had with probation officer off the record.).

THE COURT: The request for voluntary surrender is denied.

MS. LIZARRIBAR: As of today, he will be incarcerated?

THE COURT: The marshals shall take him right now.

MS. LIZARRIBAR: May I be heard on that?

THE COURT: There will be no reconsideration on that. That is exactly what I intend to do.

MS. LIZARRIBAR: May I file something in writing?

THE COURT: You may. Fine. But I don't want to reconsider. Marshal. Next case.

(End of proceedings).

[27] CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ [Illegible] 2/4/01
Signature of Court Reporter Date

United States Court of Appeals
For the First Circuit

No. 01-1298

United States
Appellee,

v.

Elliot Giraud-Pinero, Et Al,
Defendant, Appellant.

ORDER OF THE EN BANC COURT

Before
BOUDIN, Chief Judge,
TORRUELLA and SELYA, Circuit Judges,
STAHL, Senior Circuit Judge,
LYNCH AND LIPEZ, Circuit Judges,
and DOUMAR,* Senior District Judge.

Entered: November 21, 2001

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular, active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court En Banc,

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* Of the Eastern District of Virginia, sitting by designation.

[cc: Ms Torres-Pabon, Ms Colon-Melendez, Mr. Vega-Pacheco, Mr. Perez-Sosa, Ms Lizarribar-Masini, Ms Ng and Mr. Srebnick.]

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By the Court:
Janice O'Neil, Acting Clerk

By: JULIE GREGG
Julie Gregg, Appeals Attorney